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No. 90-1250 (2)

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

BURLINGTON NORTHERN RAILROAD COMPANY;
R. H. SHALHOOP

Petitioners,

vs.

JOAN FAYE WHITT, ADMINISTRATRIX OF THE
ESTATE OF WILLIAM CHARLES WHITT, DECEASED

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER THIS PARTICULAR PUNITIVE VERDICT IS AN APPROPRIATE SUBJECT FOR *CERTIORARI* REVIEW WHEN, CONTRARY TO THE FACTUAL CHARACTERIZATIONS MAINTAINED THROUGHOUT BURLINGTON NORTHERN'S BRIEF, IT WAS LEVIED FOR WANTON HOMICIDE COMPOUNDED BY COVER-UP AND IS THEREBY DISSIMILAR TO OTHER PUNITIVE VERDICTS REVIEWED BY THIS COURT?

II. WHETHER *CERTIORARI* JURISDICTION LIES WHEN THE STATE OPINION BELOW IS SILENT AS TO THE CONSTITUTIONAL ISSUE NOW ASSERTED AND PETITIONERS AT TRIAL OBJECTED ONLY TO THE JURY CHARGES REGARDING DAMAGES AND DID SO WITHOUT THE SPECIFICITY AND OFFER OF ALTERNATE CHARGES AS IS REQUIRED UNDER STATE AND FEDERAL STANDARDS OF ISSUE PRESERVATION?

III. WHETHER ALABAMA'S PUNITIVE-ONLY, WRONGFUL DEATH STATUTE IS AN APPROPRIATE SUBJECT FOR THE DISCRETIONARY EXERCISE OF *CERTIORARI* REVIEW:

A. When the statute's due process constitutionality has been upheld expressly by this Court in *Pizitz Dry Goods Co. v. Yeldell* and impliedly in the 1989 denial of *certiorari* review in *Clardy v. Sanders*?

B. When the statute stands unique in the nation as the only wrongful death action limited solely to punitive damages, thus avoiding this Court's expressed due

QUESTIONS PRESENTED - Continued

process concern arising from a great disparity between compensatory and punitive damages?

C. When the statute, enacted to prevent homicides within the borders of Alabama, provides for:
   1. The assessment of punitive damages only; and
   2. Upon a sliding scale under which punitive damages increase as the culpability of the defendant accelerates from negligence to gross negligence to wantonness and, ultimately, to intentional homicide?

IV. WHETHER THIS PARTICULAR PUNITIVE DAMAGE AWARD CONSTITUTES AN APPROPRIATE VEHICLE FOR *CERTIORARI* REVIEW OF DUE PROCESS CONSTITUTIONALITY:

A. When the verdict was subjected to four levels of post-verdict review, by both trial and appellate courts, under which it was held nonexcessive as measured under multiple standards judicially developed to counteract unbridled jury discretion?

B. When the state's highest court conducted its own $10,000,000 *de novo* reduction of the jury verdict under a shock-the-conscience redetermination of damages?

C. When a significant body of prior jury awards could have given petitioners adequate notice, in satisfaction of due process fairness, that a wanton homicide could lead to a verdict of $5,000,000?

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Respondent.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Respondent Joan Faye Whitt [hereinafter Whitt] accepts the statement of the case, as set forth by Burlington Northern Railroad [hereinafter Burlington Northern], with the following crucial exceptions:

Exception #1:

The centerpiece of Burlington Northern's petition is the argued unconstitutional assessment of punitive damages for homicidal conduct which it describes repeatedly as "simple negligence."[1] Such a characterization, however, constitutes a clear misreading of the trial record. *There was, according to the Supreme Court of Alabama, "without a doubt, substantial evidence of wantonness."*[2] The following findings of fact paint a picture of the actual case spread before the jury—one composed of willful, wanton and knowing homicide, compounded by cover-up.

Burlington Northern's train was traveling through a populace crossing at which, according to the engineer's own testimony, there was significant traffic near both schools and churches.[3] The train was operating, according to the on-board speed tape, at a maximum of fifty to fifty-five (55) miles per hour at the point of impact and in violation of the railroad's own speed limit of forty-five (45) miles per hour.[4] The engineer saw the deceased's long-nosed tractor trailer upon the tracks one-half mile from the crossing[5] and witnesses testified that, contrary to state law, he sounded no whistle prior to the collision.[6] Indeed, yet others testified

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[1] Petition ("Pet.") at 10, 11, 19, 20, 22, 24, 29,30.

[2] Pet. at Appendix ("App.") 18a.

[3] Trial Transcript ("Tr.") at 1387, 1416, 1426, 1464, 1760, 1983. Pet. at 16a, 17a.

[4] Tr. at 1937, 1526, 1511. Pet. at App. 3a, 18a.

[5] Pet. at App. 4a.

[6] Pet. at App. 4a, 18a. Tr. at 1389-90, 1397, 1408, 1443.

that he never slowed down, save at the very moment of impact.[7]

Witnesses testified that no signal lights were flashing on the deceased's side of the crossing.[8] The railroad's right-of-way was obstructed by vegetation and overhanging limbs.[9] A school bus driver testified to having had a near-accident at the same crossing due to the defective signal lights and the obstructed right-of-way.[10]

The coal laden train was traveling at a speed sufficient to propel the deceased's steel loaded, eighteen wheel truck through the next two railroad crossings and more than two-thousand (2000) feet down the track.[11] An eyewitness reported a railroad employee's returning to the crossing, immediately following the collision, and activating the crossing signal lights to make it appear that they had been working prior to the accident.[12] That same employee denied having gone back to the crossing at all until, when confronted with his inconsistent deposition statement, he admitted having done so.[13] Burlington Northern sent agents to the crossing on the day following the collision and

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[7] Pet. at App. 18a.

[8] Tr. 1393, 1402, 1452, 1479-80, 1491-92, 1534. Pet. at App. 18a.

[9] Tr. at 1496, 1756.

[10] Tr. at 1481, 1533. Pet. at App. 12a.

[11] Tr. at 1498, 1644. Pet. at App. 4a.

[12] Pet. at App. 6a. Tr. at 1406-08, 1411.

[13] Pet. at App. 6a.

cleared the previously obstructed right-of-way.[14]

Exception #2:

Burlington Northern emphasizes that Whitt's counterclaim, for the death of her husband, was in the original amount of $3,000,000.[15] Subsequent argument is offered that the verdict was "$12 million more than the plaintiff requested in her complaint. . ."[16] Regrettably, Burlington Northern neglects to point out that the original Whitt demand was withdrawn prior to submission.[17] This withdrawn *ad damnum* clause was drafted early in the proceedings and long before discovery of facts showing the depth of Burlington Northern's wanton conduct and resulting cover-up.[18]

SUMMARY OF THE ARGUMENT

Contrary to Burlington Northern's continuous characterization of this as a case of simple negligence, the Supreme Court of Alabama declared it to be one of "wantonness." While admittedly exceeding Burlington Northern's own speed limit at what he knew to be a populace crossing and

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[14] Tr. at 1400.

[15] Pet. at 2.

[16] Pet. at 13.

[17] Tr. at 2029.

[18] Even if this clause had never been withdrawn, however, its presence would not have been relevant to any argued excessiveness of a verdict which exceeded it. *See Central Microfilm Serv. Corp. v. Basic\Four Corp.*, 688 F.2d 1206, 1213 (8th Cir. 1982).

never braking save at the very moment of impact, engineer Shalhoop hit the deceased with no horns blowing, no signals flashing and no bells ringing. Compounding such culpability is the fact that a railroad employee, immediately after the collision, turned on the crossing signal lights to make it appear that they had been flashing all along as was contended by all Burlington Northern's witnesses. The day following the homicide, Burlington Northern returned to the scene and removed obstructing undergrowth from its right-of-way. These multiple acts of culpability, particularly when resulting in death, serve as a basis from which the jury presumably found wanton homicide with accompanying cover-up. As such, this verdict is crucially different from other punitive awards before this Court and, unlike them, should be denied *certiorari* review.

Discretionary *certiorari* jurisdiction does not lie because Burlington Northern failed to properly press the due process issue in the trial below. The federal question was not raised except in attack upon the trial court's damage charges to the jury and, even then, the objection failed to meet the state and federal requirements of issue preservation in terms of specificity and the offering of alternate and constitutionally proper jury instructions. This failure to press properly the federal question resulted in the Alabama Supreme Court's opinion containing no mention of constitutionality.

The due process constitutionality of Alabama's wrongful death statute has been upheld in this Court both expressly by decision to the merits and impliedly by refusal to grant it *certiorari* review. It is nationally unique in its allowance of solely punitive damages; consequently, verdicts rendered thereunder present no problem of disparity between the amounts of compensatory and punitive damages. No due

process impediment exists to prevent the Alabama legislature, when attempting to prevent homicides within its borders, from providing exclusively for punitive damages measured by the level of the defendant's culpability.

The following further characteristics of the Whitt verdict reveal its inappropriateness as a vehicle for exercise of *certiorari* review:

(1) It was subjected to four levels of post-verdict review both at trial and on appeal. These judicial reassessments were based upon a body of procedural safeguards and standards which have been evolved by the judiciary specifically for measuring verdict excessiveness. These standards, with their multiple levels of application, guaranteed full due process to Burlington Northern.

(2) Burlington Northern had full notice, from any review of past verdicts, that its heightened culpability, compounded by cover-up, could lead to a wrongful death verdict of the $5,000,000 magnitude. Such predictability fully complies with due process fairness.

(3) The Supreme Court of Alabama took a $15,000,000 jury verdict and, based upon its *de novo* authority to remit for amount alone, reduced the award to $5,000,000—a $10,000,000 *remittitur* that is the largest in Alabama history. Such a dramatic reduction, standing alone, distinguishes this verdict from all other punitive awards before this Court and works to remove any hint of unbridled or standardless jury discretion that arguably might otherwise have deprived Burlington Northern of its constitutional right to due process.

REASONS FOR DENYING THE WRIT

I. THIS PARTICULAR PUNITIVE VERDICT IS NOT AN APPROPRIATE VEHICLE FOR *CERTIORARI* REVIEW BECAUSE, CONTRARY TO THE FACTUAL CHARACTERIZATIONS MADE THROUGHOUT BURLINGTON NORTHERN'S PETITION, IT WAS LEVIED FOR WANTON HOMICIDE COMPOUNDED BY COVER-UP AND IS THEREBY DISSIMILAR TO THOSE VERDICTS GRANTED REVIEW IN *BROWNING-FERRIS INDUSTRIES v. KELCO DISPOSAL, INC.* AND *PACIFIC MUTUAL LIFE INSURANCE COMPANY v. HASLIP*.

The centerpiece of Burlington Northern's petition is the characterization, both express and implied, of this case as one of simple negligence. Such a mischaracterization necessitates the respondent Whitt's addressing this question even before treating the threshold jurisdiction issues.

The Supreme Court of Alabama expressly recognized that the Whitt jury had before it "without a doubt, substantial evidence of wantonness." Pet. at App. 18a. While approaching a populace crossing, with schools and churches of which he was aware from extensive past experience, engineer Shalhoop was operating the train at fifty to fifty-five (55) miles per hour in violation of Burlington Northern's own speed limit. This speed, according to eyewitnesses, was never reduced except right at the point of impact. Numerous witnesses described the view at the crossing to be significantly obstructed by undergrowth allowed to exist in Burlington Northern's right-of-way. Traveling thusly, with no horn blowing as required by Alabama statute and no lights flashing, the Burlington Northern train carried the deceased's fully-loaded, eighteen

wheel truck over one-half mile down the track where an ensuing explosion engulfed both train and truck. *See herein* Statement of the Case.

These acts of heightened culpability were compounded by additional evidence of cover-up and collusion. All railroad employees riding back to the home office maintained throughout the trial that they never once spoke of the accident. Tr. at 1758, 1784, 1785. Engineer Shalhoop steadfastly maintained that bells on the train were ringing until he was forced to admit on cross-examination that the train had no bells. Tr. at 1497, 1970. After on-board railroad employees maintained that the crossing lights were working on the deceased's side of the track, witnesses observed a black railroad employee approach the crossing, after the accident, and trigger the switch on the crossing lights. The only on-board black employee testified that he never went back to the crossing post-accident and then was forced to admit on cross-examination that he had admitted doing so during deposition taking. Finally, Burlington Northern employees cleared the undergrowth from the crossing on the day following the collision.

The collective force of these and other facts justified a jury verdict based upon a heightened level of culpability constituting wantonness compounded by cover-up. Such culpability, resulting in death, is a factor distinguishing this verdict from all others before this Court,[19] thus rendering it an inappropriate vehicle for *certiorari* review.

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[19] *See Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989); *Pacific Mutual Life Ins. Co. v. Haslip*, No. 89-1279, argued October 3, 1990, *cert. granted*, 110 S. Ct. 710 (1990).

II. NO *CERTIORARI* JURISDICTION LIES BECAUSE THE FEDERAL QUESTION, REGARDING THE CONSTITUTIONALITY OF ALABAMA'S PUNITIVE-ONLY WRONGFUL DEATH STATUTE, WAS NOT PROPERLY PRESSED AT TRIAL OR PASSED UPON BY THE SUPREME COURT OF ALABAMA.

A. Burlington Northern Failed To Press The Federal Question At Trial With The Prerequisite Specificity As Required Under Both Federal And State Standards Governing Issue Preservation.

A condition precedent to *certiorari* jurisdiction is issue preservation in the trial below. A showing is required that Burlington Northern raised the federal question at trial, regarding any due process unconstitutionality of wrongful death damages, by asserting it in both a timely and a proper manner. Sup. Ct. R. 14.1(h). *See Charleston Fed. Sav. & Loan Ass'n v. Alderson*, 324 U.S. 182, 185 (1944). No objection satisfies this appellate rule unless it raises the issue unmistakably and offers more than a mere inference. *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309 (1903). The purpose of such a requirement is to enable the court below "to take appropriate corrective action." *Douglas v. Alabama*, 380 U.S. 415, 422 (1965). Such a requirement of specificity and clarity likewise applies under longstanding Alabama law.[20]

Against the backdrop of such state and federal requirements of specificity, the focus of Burlington Northern's constitutional attack at trial consisted solely of the following

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[20] *See Harper v. Gafa Transp. Co.*, 432 So. 2d 1234 (Ala. 1983); *Nelms v. Allied Mills Co.*, 387 So. 2d 152 (Ala. 1980). *See* C. Gamble, *McElroy's Alabama Evidence* § 426.01(7) (3d ed. 1977).

one sentence objection to the court's jury charge concerning punitive damages:

> If Your Honor please, the Defendants object to the Court's charge in regard to punitive damages and suggest to Your Honor that this constitutes a deprivation of property for the Defendants without due process of law in violation of the 5th and 14th Amendments to the United States Constitution and the Constitution of the State of Alabama.

Pet. at 6. No further elaboration was offered regarding the constitutional defectiveness of the damage instructions. Burlington Northern left the trial judge to his own devices in inferring the precise nature of the federal question that was being raised.[21] No further effort was made in satisfying the requirement that the federal issue be "specially set up and claimed." *Harding v. Illinois*, 196 U.S. 78, 85 (1904). Such was not brought to the attention of the trial judge in the prerequisite "unmistakable manner." *Dewey v. Des Moines*, 173 U.S. 193, 198 (1898).

Only weeks later, at the post verdict hearing on its motion for new trial, did Burlington Northern offer any specific explanation as to how the argued unconstitutionality manifested itself in the case. Pet. at 7. It was then that Burlington first enunciated its present theory that due process unconstitutionality lies in the wrongful death statute's allowance of punitive damages for simple negligence. Pet. at 7. Only then was any mention made at all that the jury charges on damages were of such vagueness that, even when tempered by successive levels of post-

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[21] *See Wilson v. Crouse-Hinds Co.*, 556 F.2d 870, 875 (8th Cir.), *cert. denied*, 434 U.S. 968 (1977). *Compare* Fed. R. Civ. P. 51; Ala. R. Civ. P. 51.

verdict review, they permit unbridled jury discretion and, thereby, constitute a deprivation of due process.

B. Burlington Northern Failed, In Compliance With The Requirements of Alabama Appellate Practice, To Offer Constitutionally Proper Jury Charges To Be Given In Lieu Of Those Attacked As Vague And Violative Of Due Process.

Beyond a mere lack of specificity, Burlington Northern owed the trial court an opportunity to correct any error in instructions. *Johnson v. Houser*, 704 F.2d 1049 (8th Cir. 1983). It had the responsibility to have offered its own "constitutionally correct" jury instructions or to have informed the trial court as to how the court's own charges could have been drafted to meet constitutional due process muster.[22] Never was Burlington Northern specific enough to assist the trial court in envisioning the unconstitutionally offending language or in drafting substitute charges which would comply with the cited constitutional provisions. Burlington Northern did offer some fifty-eight (58) jury charges but not a single one dealt with damages. Tr. at 905-37.

In addition to violating the spirit of federal principles calling for benefiting the trial court with suggested alternative charges that are not erroneous, Burlington Northern failed to comply with what the Supreme Court of Alabama has characterized as "fundamental concepts of issue preservation under state law." *Central Ala. Elec. Coop. v. Tapley*,

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[22] *See* Fed. R. Crim. P. 30; *United States v. Hecht*, 705 F.2d 976 (8th Cir. 1983) (holding that the object of Rule 30 of the Federal Rules of Criminal Procedure "is to inform the trial judge of any possible error in the instructions so that he may have an opportunity to correct them").

546 So. 2d 371, 375 (Ala. 1989). Other Alabama litigants have mounted similar due process challenges to punitive damages on appeal. Some, for example, have argued that the proper remedy for satisfying a defendant's due process rights is to bifurcate the trial, permitting the judge to decide punitives or, alternatively, to allow the jury to assess them but upon criteria not admissible during the liability phase of the trial. *See Coburn v. American Liberty Ins. Co.*, 341 So. 2d 717 (Ala. 1977). Yet others have urged that the jury should be charged that punitive damages are only to be assessed upon clear and convincing evidence. However, all such litigants have been denied access to appellate jurisdiction upon these grounds when no such corrective or remedial suggestions were made to the trial court below. Instructions may not be the focus of attack on appeal, as violating due process, if no alternative charges were offered at trial. *Central Ala. Elec. Coop.*, 546 So. 2d at 375. Properly pressing the federal question in state court, as a condition precedent to the exercise of *certiorari* jurisdiction, requires—at a minimum—that the constitutional issue be asserted "in the manner required by state law." *Webb v. Webb*, 451 U.S. 493, 501 (1981). Burlington Northern failed in this regard.

C. The Supreme Court Of Alabama, Whose Decision Serves As The Basis For Burlington Northern's *Certiorari* Petition, Never Mentioned The Federal Constitutional Question.

Burlington Northern failed to satisfy reasonable state and federal rules of issue preservation at trial. When such occurs, and is combined with silence on the federal question by the state's highest court, this Court customarily declines to exercise its *certiorari* jurisdiction. *Mutual Life Ins. Co. v. McGrew*, 188 U.S. 291, 309 (1903). Silence by the

Supreme Court of Alabama is assumed to be due to Burlington Northern's procedural deficiency at trial in its failure both to provide the prerequisite specificity and to furnish the trial court with alternate jury charges regarding damages. *Street v. New York*, 394 U.S. 576, 582 (1969) (if highest state court fails to pass upon the federal question, "it will be assumed that the omission was due to want of proper presentation in the state courts"); *Bailey v. Anderson*, 326 U.S. 203, 206 (1945).

Without question, Burlington Northern's failure to raise the constitutional issue properly at trial could be overlooked if the state appellate court had considered and passed upon the federal question. *Whitfield v. Ohio*, 297 U.S. 431, 436 (1936). As this Court has observed:

> Where it appears from the opinion of the state court of last resort that the State statute was drawn in question, as repugnant to the constitution, and that the decision of the court was in favor of its validity, we have jurisdiction on appeal.

Charleston Fed. Sav. & Loan Ass'n v. Alderson, 324 U.S. 182, 185 (1944). However, the decision of Alabama's highest court, to whom *certiorari* is requested in the present case, is conspicuously silent regarding the constitutionality issue now asserted. There is no indication that Burlington Northern's constitutional challenge was considered and decided by the Supreme Court of Alabama. Such silence forecloses any overlooking of Burlington Northern's failure at trial to surmount procedural hurdles under both state and federal law. *See Crowell v. Randell*, 10 Pet. 368, 392 (1836) (observing that the jurisdiction to review exists only if the federal question "did arise in the court below and a decision was actually made thereon"). Respondent Whitt submits that such silence jurisdictionally precludes review.

Even if deemed only prudential, however, Whitt alternatively urges that the more prudent course in this case is to decline the exercise of *certiorari* jurisdiction.[23]

III. ALABAMA'S WRONGFUL DEATH STATUTE IS NOT A COMPELLING VEHICLE FOR EXERCISE OF *CERTIORARI* JURISDICTION.

A. The Due Process Constitutionality of Alabama's Wrongful Death Statute Has Been Upheld By This Court Expressly In *Louis Pizitz Dry Goods Co. v. Yeldell* And Impliedly By The 1989 Denial Of *Certiorari* Review In *Clardy v. Sanders.*

Rejecting a due process challenge to Alabama's wrongful death act as early as 1927, this Honorable Court observed:

> The legislation, now challenged, has been on the statute books of Alabama in essentially its present form since 1872. Its constitutionality has been upheld in both state and federal courts. We cannot say that it is beyond the power of the legislature, in effecting such a change in common law rules, to attempt to preserve human life by making homicide expensive.

Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112, 114-16 (1927). *Pizitz* broadly affirms the due process constitutionality of Alabama's punitive-only wrongful death act. Burlington Northern, whose culpability in this case far exceeded simple negligence, attempts to escape the breadth of this affirmance by arguing that *Pizitz* was limited to the issue of punitives for vicarious responsibility and not punitives for primary negligence. Neither the letter nor

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[23] *See Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988) (refusing to review and characterizing same as the "more prudent course"); *Illinois v. Gates*, 462 U.S. 213 (1983).

spirit of *Pizitz*, however, is limited in this respect. Indeed, *Pizitz* cites an earlier decision from the old Fifth Circuit which likewise broadly upholds the due process constitutionality of the act. *See United States Cast Iron Pipe & Foundry Co. v. Sullivan*, 3 F.2d 794, 795 (5th Cir. 1925). The *Sullivan* court, as expressed in the following statement, did not place primary emphasis upon either vicarious liability or negligence—rather, the emphasis was and is upon *any* conduct which results in homicide:

> In the absence of statute, punitive or exemplary damages are recoverable in civil actions for certain kinds of wrongful conduct. It is clearly within legislative competency to give a civil right of action for the negligent or wrongful killing of a human being, and to make the wrongdoer liable for punitive or exemplary damages.

3 F.2d at 795-96. Even if *Pizitz* affirmed only the constitutionality of levying punitive damages vicariously upon an employer not culpable at all, however, that would logically carry the lesser included inference that punitives may be levied constitutionally upon one who is culpable, albeit only of negligence.

While respondent Whitt recognizes that age and judicial affirmance of a statute do not insure that it is constitutional, such should be weighed in this Court's determination of whether a verdict rendered under Alabama's wrongful death statute should be granted *certiorari* review. *See Brennan v. United States Postal Serv.*, 439 U.S. 1345, 1347 (1978).

The final, and perhaps dispositive, chapter in the story of constitutional attack upon Alabama's wrongful death statute came in the recent case of *Clardy v. Sanders*, 551 So. 2d 1057 (Ala.), *cert. denied*, 110 S. Ct. 376, 107 L. Ed. 2d

362 (1989). In *Clardy*, this Court had before it, on petition for writ of *certiorari*, a $2,750,000 jury verdict rendered under Alabama's punitive-only, wrongful death act. Despite what appeared to be a procedurally unencumbered opportunity to speak to the due process constitutionality of the statute, this Court declined to do so.

Respondent Whitt respectfully submits that, after its affirmance of the statute's constitutionality in *Louis Pizitz Dry Goods* and its refusal to pass on it again in *Clardy*, this Court should not now speak to this issue. Such long affirmance of the statute's constitutionality, when combined with its uniqueness, renders it a noncompelling vehicle for *certiorari* review.

B. Alabama's One-Of-A-Kind, Wrongful Death Statute, Judicially Interpreted As Providing For Punitive Damages Only, Fails Because Of Its Uniqueness To Present The Kind Of Substantial And Important Question Upon Which To Resolve National Due Process Issues Regarding Punitive Damages.

The primary due process concern regarding punitive damages, expressed by Justices of this Court, has focused upon the disparity between compensatory and punitive damages. *See Browning-Ferris Indus.*, 109 S. Ct. 2909 (1989) (compensatory damages of $51,146 and punitives of $6,000,000). Justice O'Connor, speaking in *Browning-Ferris*, bottomed her particular due process concern upon the fact that the punitive damages were 117 times greater than the compensatory damages. 109 S. Ct. at 2921. *Compare Cudahy Co. v. Miller*, 656 F. Supp. 316 (D. Kan. 1987), *aff'd in part, rev'd in part*, 858 F.2d 1449 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 3265 (1989) (in which

certiorari was denied in due process challenge where the punitive award of $10,000,000 was only three and one-third times the compensatory damages). The disparity problem is manifest in *Pacific Mutual Life Ins. Co. v. Haslip* which is now under review on writ of *certiorari* to test the due process constitutionality of a non-wrongful death, punitive damage verdict awarded in Alabama. *Pacific Mutual*, crucially dissimilar to the present case, concerns a fraud action in which the punitive damages were in astronomical disproportion to the actual damages. Indeed, the plaintiff in *Pacific Mutual* was awarded $1,040,000 in punitive damages for defendant's bad faith refusal to pay a $2,500 hospital bill. Even if the Supreme Court in *Pacific Mutual* were to declare unconstitutional a punitive damage award in fraud, largely because of its disparity to actual damages, respondent submits that such an infirmity would not reach a verdict rendered under Alabama's punitive-only, wrongful death act.[24]

Alabama's wrongful death act is unique and, thereby, stands as an inappropriate medium through which to

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[24] Alabama Supreme Court Justice Maddox dissented in *Pacific Mutual*, as he has done consistently in punitive damage decisions, due to his belief that Alabama's general method of punitive damage assessment is constitutionally flawed. However, he joins a unanimous Court in approving the present verdict at $5,000,000 after a $10,000,000 reduction. This shift to the majority is due, in his own words, to the belief that Alabama's punitive-only, wrongful death statute is unique and not susceptible to the same constitutional analysis as that applied to verdicts with both compensatory and punitive components. *Pacific Mut. Life Ins. Co. v. Haslip*, 553 So. 2d 537, 545, n.8 (Ala. 1989). *See also Clardy v. Sanders*, 551 So. 2d 1057 (Ala.), *cert. denied*, 110 S. Ct. 376, 107 L. Ed. 2d 362 (1989) (in which two Alabama Justices emphasize in concurrence that Alabama's wrongful death statute must be considered in a different light than constitutional challenges to punitive damages in other tort actions).

announce nationwide principles regarding the constitutionality of punitive damages. Alabama's statute gives rise to the only wrongful death action in the United States which leads exclusively to punitive damages.[25] All other wrongful death verdicts possess the common thread of allowing family survivors, if the punitive award is reduced or struck down as violative of due process, to find recompense in the remaining compensatory award. However, Alabama survivors, like the widow Whitt, find no similar solace.[26] The probable reason, for this Court's denial of *certiorari* in *Clardy v. Sanders*, *supra*, was that any resulting decision would have been unique to Alabama and of no precedential value to general punitive damage law nationally. Respondent Whitt respectfully submits that, because of the *sui generis* status of Alabama's statute, this Court should similarly deny *certiorari* in the present case.

C. Due Process Does Not Preclude Alabama, Desirous of Preventing Homicides Within Her Borders, From Enacting a Wrongful Death Statute Which Provides For:

1. The Assessment of Punitive Damages Only

The punitive-only aspect of Alabama's wrongful death act renders it *sui generis*, which customarily results in this Court's declination of *certiorari* jurisdiction. However, Burlington Northern takes this same uniqueness and argues

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[25] *See Massachusetts Bonding & Ins. Co. v. United States*, 352 U.S. 128, 130-31 (1956) (recognizing that only Alabama and Massachusetts give their wrongful death statutes a punitive-only construction); *Hoyt v. United States*, 286 F.2d 356-57 (5th Cir. 1961) (recognizing that even Massachusetts subsequently amended its wrongful death statute to provide for compensatory damages).

[26] *See* C. Gamble, *Alabama Law of Damages* 490 (2d ed. 1988).

that it, along with the corresponding absence of compensatory damages, vests standardless discretion in the jury sufficient to constitute constitutional deprivation of due process. Pet. at 15. The sole authority for this argument lies in reference to a so-called "overwhelming majority" of jurisdictions which, by statute or case law, opt to provide that actual damages are a prerequisite to the assessment of punitive damages. Pet. at 15, 16. Whitt respectfully submits that this is a misleading categorization for several reasons. First, it fails to recognize the very healthy number of courts which hold to the contrary, including cases involving defamation *per se*.[27] Additionally, no mention is made of those included jurisdictions which allow punitive damages when actual damages are no more than nominal.[28] Most crucially, Burlington Northern neglects to reference those jurisdictions holding that an exception to the "overwhelming majority" rule arises whenever a statutory cause of action, like Alabama's wrongful death act, provides otherwise.[29]

While Burlington Northern correctly documents a shift in

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[27] *See, e.g., Appleyard v. Transamerican Press, Inc.*, 539 F.2d 1026 (4th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976); *see also* Annot., 40 A.L.R.4th 12 (1985).

[28] *See, e.g., Lawrence v. Risen*, 598 S.W.2d 474 (1980); *Werschkull v. United California Bank*, 85 Cal. App. 3d 981, 149 Cal. Rptr. 829 (1978) (nominal damages of $1 held to support award of $550,000 in punitives); *Lassitter v. International Union of Operating Engineers*, 349 So. 2d 622 (Fla. 1976).

[29] *See Nitti v. Credit Bureau of Rochester, Inc.*, 84 Misc. 2d 277, 375 N.Y.S.2d 817 (1975) (solely punitive damages allowed for violation of Federal Fair Credit Reporting Act); *Rogers v. Loether*, 467 F.2d 110 (7th Cir. 1972), *aff'd*, 415 U.S. 189 (1974) (zero actual and $250 punitive damages awarded under Civil Rights Act of 1968).

the common law evolution of damages, such is not a matter of constitutional imperative. Indeed, no constitutional law is cited to support Burlington Northern's position because none exists. Pet. at 14-18. State movement toward correlating punitive and compensatory damages does not lead to the inference that those same states would deem themselves constitutionally powerless to recognize causes of action leading solely to punitive damages.

2. And For Computation Of Those Damages Upon a Sliding Scale Under Which The Punitive Award Increases As The Defendant's Culpability Accelerates From Negligence To Gross Negligence To Wantonness And, Ultimately, To Intentional Homicide

Burlington Northern was guilty of wanton homicide, thus rendering this not a case of simple negligence. *See* Pet. at App. 18a. It is acknowledged that the jury was charged that the amount of punitive damages assessed should be measured by the amount of the wrongdoing of the defendants and the deterrent effect upon these and other defendants engaging in the same or similar conduct in the future. Pet. at 12. The clear import was that low punitives were to be assessed for mere negligence and—as the level of culpability rises to gross, wanton and then intentional—the punitive damages were to be increased correspondingly. If the resulting punitives were erroneously disproportionate to the level of the defendant's culpability, the trial and appellate courts could remit and, indeed, such was done in the amount of $10,000,000.

Despite this actual state of the case, Burlington Northern undertakes a facial challenge of Alabama's wrongful death statute based upon the hypothetical possibility that a

punitive damages verdict could be based upon simple negligence and thereby violate due process. Beyond this, the more advanced position is asserted that such due process unconstitutionality likewise would apply to the levying of punitive damages for death resulting either from gross negligence, Pet. at 19, or any culpability short of intentional homicide. Pet. at 22, 25 (discussing a "mens rea" requirement). Burlington Northern cites no supporting constitutional law on the civil side. First, Alabama's wrongful death act has been characterized as both nonpenal on its face[30] and in its effect.[31] Secondly, even if the statute is penal, this Court has been unwilling to apply criminal constitutional principles simply because "punitive damages are imposed through the aegis of courts and serve to advance governmental interests . . . in a case between private parties."[32] However, by arguing that punitives should require a *mens rea*, and that Alabama's wrongful death statute is penal, Burlington Northern is then able to make the analogical leap to constitutional criminal cases. Reliance thereon, however, is misplaced. Lastly, this Court continues to emphasize the freedom that is vested in legislatures to decide how much sentencing discretion, even in criminal cases, should be left with the judge and jury. *See Lockett v. Ohio*, 438 U.S. 586, 603 (1978). Even those constitutional challenges to total sentencing discretion in capital cases has been held bottomed on the Eighth Amendment rather than the Due Process Clause. *See McGautha*

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[30] *See, e.g.*, Pizitz, 274, U.S. at 114; *Esdale v. Baxter*, 219 Ala. 256, 257 (1929); *Southern Ry. v. Bush*, 122 Ala. 470, 489, 26 So. 168, 174 (1899)

[31] Industrial Chemical, 547 So. 2d at 818.

[32] Browning-Ferris, 109 S. ct. at 2920.

v. California, 402 U.S. 183 (1971). *Compare Baldwin v. Alabama*, 472 U.S. 372 (1985) (holding constitutional capital sentencing procedures very similar to those applied in Alabama's process of imposing and reviewing punitive damage verdicts).

IV. THE WHITT VERDICT PRESENTS AN INAPPROPRIATE SUBJECT FOR THIS COURT'S EXERCISE OF DISCRETIONARY *CERTIORARI* REVIEW

A. The Whitt Verdict Was Subjected To Four Levels Of Post-Verdict Trial And Appellate Reassessment Conducted Under An Extensive Battery of Standards And Procedural Safeguards That Were Judicially Evolved To Preclude Unbridled Jury Discretion And To Meet Or Exceed All Due Process Requirements.

Alabama courts have shown an increasing willingness to abandon the historic "hands off" approach to jury awards of punitive damages. The catalyst for such a new judicial attitude, aimed at more fully satisfying the due process rights of defendants, was this Court's dissatisfaction with insufficient punitive damage standards as expressed in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828 (1986). In reaction to *Lavoie*, the Supreme Court of Alabama devised exhaustive and creative standards by which to review the appropriateness of a punitive damage verdict. These standards are contained in what is now widely and popularly known in Alabama as the decisions constituting "*Hammond* and its progeny." The standards include, among other factors, such considerations as the relationship between the size of the award and the threatened harm, the degree of reprehensibility regarding the defendant's conduct, awareness of danger by the defendant, cover-up by the defendant,

profits derived from the culpable conduct, wealth or poverty of the defendant, criminal sanctions levied upon the defendant, and similar civil actions filed against the defendant.[33] These verdict considerations possess an uncanny resemblance to the measuring principles that some observers predict that this Court will establish if it deems historic punitive damage formulae to be violative of due process. *See* Recent Developments, *Constitutional Limits to Punitive Damage Awards*, 13 Harv. J.L. & Pub. Pol'y 367, 380 (1990). Alabama Courts have applied these factors in regularly and dramatically reducing verdicts.[34]

Consistent with this new constitutional agenda for testing verdicts, the Whitt verdict was subjected to the following four levels of post-verdict review conducted under the foregoing standards:

Review #1: Trial level *Hammond* review. The trial judge reassessed the appropriateness of the verdict amount as judged under the multiple factors established in *Hammond* and its progeny. Such a *Hammond* hearing is mandatory and requires that the trial court make on-the-record findings

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[33] *See Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986); *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989).

[34] *See, e.g., Alabama Power Co. v. Turner*, ___ So. 2d ___ (1991) [Ms. 89-408, Jan. 11, 1991] (reducing $5,000,000 wrongful death verdict by $3,500,000); *State Farm Mut. Auto Ins. Co. v. Robbins*, 541 So. 2d 477 (Ala. 1989) (fraud verdict of $5,000,000 reduced to $500,000); *Consolidated Freightways v. Pacheo-Rivera*, 524 So. 2d 346 (Ala. 1988) (reduction of $100,000 verdict to $15,000 and $250,000 verdict to $50,000); *Harmon v. Motors Ins. Corp.*, 493 So. 2d 1370 (Ala. 1986) ($500,000 fraud verdict reduced to $40,000); *General Motors Corp. v. Edwards*, 482 So. 2d 1176 (Ala. 1985) (wrongful death verdict of $2,000,000 reduced by $600,000).

as to why the verdict should be reversed, modified or allowed to stand. Burlington Northern had the right, at such hearing, to offer evidence showing the inappropriateness of the verdict amount.[35] Pet. at App. 19a.

Review #2: Appellate level review of *Hammond* findings of trial court. The Alabama Supreme Court conducted a review of the trial judge's findings in level #1 to determine whether he conducted an error-free assessment of the verdict amount as measured by the *Hammond* standards. The Court concluded that there was no error committed by the trial judge in this regard. Customarily, the result of such a *de novo* reassessment is expressed merely by quoting verbatim from the trial judge's own *Hammond* order.[36] Such was done in the present case and the quotat. occupied four full pages of the appellate decision.

Review #3: Appellate level, *de novo Hammond* review. As a matter of right, Burlington Northern received a *de novo* reconsideration, as to the excessiveness measured under the *Hammond* standards, from the highest appellate court of Alabama. The Supreme Court of Alabama made its own assessment of whether the amount of the verdict was excessive when measured under the standards established in

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[35] *See Industrial Chem. & Fiberglass Corp. v. Chandler*, 547 So. 2d 812 (Ala. 1989).

[36] *See, e.g., Olympia Spa v. Johnson*, 547 So. 2d 80 (1989) (affirming $3,000,000 verdict by quoting trial judge's order); *Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249 (Ala. 1986) (affirming $3,500,000 wrongful death verdict by quoting extensively from trial judge's *Hammond* order).

Hammond and its progeny.[37] Such a review may include a consideration of all relevant *Hammond* factors, including those not necessarily considered by the trial judge.[38]

Level #4: Appellate level, *de novo*, shock-the-conscience redetermination. The Supreme Court of Alabama found no error and its own *de novo* reassessment of the verdict via the *Hammond* standards revealed no excessiveness. Even though levels of review #1, #2 and #3 thus resulted in no basis for lowering the present verdict, the Court exercised a fourth level, *de novo* jurisdiction to remit the verdict based upon a comparative, shock-the-conscience standard. It was this fourth level of review which resulted in the verdict's reduction by $10,000,000—the largest remittitur in Alabama history. The Supreme Court of Alabama conducted its own redetermination of damages under a historic "shock-the-conscience" standard. Remittitur was ordered because the Whitt award seemed, after a comparative study of other verdicts, simply "too much."

Burlington Northern therefore was afforded repeated opportunities to be heard as to the excessiveness of the verdict. Successive stages of independent, post-verdict review by the judiciary checked any potential, unbridled jury discretion. Due process requires no more.

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[37] *See Central Ala. Elec. Coop. v. Tapley*, 546 So. 2d 371 (Ala. 1989).

[38] *See Alabama Power Co. v. Cantrell*, 507 So. 2d 1295, 1305 (Ala. 1986) (in affirming a $1,000,000 verdict the Supreme Court indicates that it is empowered to conduct its own consideration of *all* the *Hammond* factors).

B. Reduced From $15,000,000 To $5,000,000, As A Result Of The Supreme Court Of Alabama's *De Novo* Redetermination Of Damages, This Particular Verdict Comes Before The Court Untainted By Standardless Jury Discretion And In Full Satisfaction Of Burlington Northern's Due Process Rights.

Leading authorities suggest that a way to avoid unbridled jury discretion, and more nearly satisfy the due process rights of defendants, is for judges themselves to set the amount of punitive damages. *See* Ellis, *Punitive Damages, Due Process, and the Jury*, 40 Ala. L. Rev. 975, 1005 (1989). Active *remittitur* by the judiciary, according to one pioneering scholar, may well work to prevent jury awards "from violating a corporation's due process rights." Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 Chi. L. Rev. 1, 50 (1982); *see* Note, *Can Punitive Damages Standards Be Void for Vagueness?*, 63 St. John's L. Rev. 52, 67 (1988). Reduction of the present verdict by $10,000,000, the largest *remittitur* in Alabama history, constitutes the apex of such judicial activism in verdict reassessment. The Supreme Court of Alabama, utilizing its statutory power to conduct a complete and *de novo* redetermination of punitive damages, ordered *remittitur* under a historic "shock-the-conscience" standard which resulted in the conclusion that the original verdict was simply "too much." Pet. at App. 24a. *See* Code of Ala. § 12-22-71 (1975) (authorizing appellate courts to order remittitur when there is no other ground of reversal save excessiveness).

Such dramatic judicial intervention, in totally reassessing punitive damages, sustains the Whitt verdict against a due process challenge. The original $15,000,000 jury award

has been converted, through the exercise of *de novo* appellate reduction, into a judge's verdict of $5,000,000. It thereby has been purged of any unbridled jury discretion by the fact that the highest appellate court has intervened and, even without error or abuse of discretion by either the jury or trial judge, has conducted what one constitutional reformer has termed a "second level of judicial review." *See* Recent Developments, *Constitutional Limits to Punitive Damage Awards*, 13 Harv. J.L. & Pub. Pol'y 370, 381, at n.71 (1990). Such a significant abrogation of jury discretion fully satisfies those due process concerns expressed in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 109 S. Ct. 2090, 2923-24 (1989), by several concurring members of this Court. It likewise distinguishes this verdict from that now before the Court in *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So. 2d 537, *cert. granted*, 110 S. Ct. 1780 (1990) (No. 89-1279, argued October 3, 1990). This demonstration of Alabama remittitur practice guarantees an amount that comports fully with the due process rights of Burlington Northern. A verdict so significantly reduced renders it an inappropriate vehicle for exercise of *certiorari* review. *See Hodder v. Goodyear Tire & Rubber Co.*, 426 N.W.2d 826 (Minn. 1988), *cert. denied*, 109 S. Ct. 3265 (1989) (*certiorari* denied in case where the state court had reduced the punitive damage award from $12,500,000 down to $4,000,000).

C. A Review Of Prior Jury Verdicts Would Have Given Burlington Northern Notice, Sufficient To Satisfy Due Process Fairness, That Its Wanton Homicide Could Lead To A Verdict Of $5,000,000.

A part of Burlington Northern's due process argument, beyond that of standardless jury discretion, is lack of notice

regarding a verdict of this magnitude. However, Burlington Northern is presumed to know the law of the states in which it operates and, through that knowledge, was well aware of the extensive standards applied in Alabama for measuring the appropriate amount of punitive verdicts. Due process does not require standards that lead to exact mathematical computation. To hold otherwise would permit railroads like Burlington Northern to plan profitable but culpable conduct and to know, in advance, the resulting cost. Additionally, a survey of other verdicts, within and without Alabama, would have served clear notice upon Burlington Northern that homicide caused by wanton conduct, compounded by cover-up, could lead to a wrongful death verdict of $5,000,000.[39]

CONCLUSION

Certiorari jurisdiction does not lie due to Burlington Northern's failure to properly press the due process issue during the trial below. Such failure to preserve the issue is confirmed by the fact that the state court's opinion, serving as the basis for the present petition, is silent as to the constitutional question.

Alabama's wrongful death statute has been expressly

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[39] *See, e.g., Black Belt Wood Co. v. Sessions*, 514 So. 2d 1249 (Ala. 1986) ($3,500,000) (wrongful death verdict); *Herold v. Burlington Northern, Inc.*, 761 F.2d 1241 (8th Cir.), *cert. denied*, 474 U.S. 888 (1985) ($11,675,000) (jury verdict against Burlington Northern in railroad crossing collision case with near duplicative issues). *See also The 10 Largest Jury Verdicts of 1988*, 75 A.B.A. J. 45 (March 1989); *More Big Bucks in Jury Verdicts—Additions to the 1988 List*, 75 A.B.A. J. 69 (July 1989) (reporting wrongful death verdict of $25,000,000); *Recent Verdicts, 2 Ala. Trial L. J.* 16 (Summer 1983) (*Hicks v. Ireland*) ($25,000,000 jury verdict in wrongful death).

upheld, against a due process challenge, by both this Court and lower federal courts. Additionally, it stands unique as the only wrongful death statute in the nation that permits the recovery of punitive damages only; thus precluding any problem of disparity between compensatory and punitive damages. Both its judicial affirmance and uniqueness render it an inappropriate medium for *certiorari* review regarding national punitive damage issues. Additionally, due process in no way precludes such a punitive-only statute, aimed at preventing homicides, where damages are based on the level of a defendant's culpability.

The original $15,000,000 award was based upon wanton homicide, compounded by cover-up. Despite such heightened culpability, the verdict was subjected to remittitur and reduced by $10,000,000. The result was a $5,000,000 wrongful death verdict which is reasonable when compared with other similar awards and one the likelihood of which Burlington Northern should have been fully aware. This dramatic judicial intervention came only after the verdict surmounted four levels of post-verdict reassessment in which it was tested under a substantial body of newly-evolved standards for measuring excessiveness. In every regard, Burlington Northern Railroad received all the process that due process requires.

For all the foregoing reasons, the petition for *certiorari* should be denied.

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